

1 TERRY E. SANCHEZ (State Bar No. 101318)
terry.sanchez@mto.com
2 PUNEET K. SANDHU (State Bar No. 254726)
puneet.sandhu@mto.com
3 MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
4 Thirty-Fifth Floor
Los Angeles, California 90071-1560
5 Telephone: (213) 683-9100
Facsimile: (213) 687-3702

6 Attorneys for Defendants WELLS
7 FARGO & COMPANY; WELLS FARGO
ADVISORS, LLC; and WELLS FARGO
8 ADVISORS FINANCIAL NETWORK,
LLC

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION
12

13 KENNISON WAKEFIELD,
individually and on behalf of all other
14 similarly situated,

15 Plaintiff,

16 vs.

17 WELLS FARGO & COMPANY,
WELLS FARGO ADVISORS, LLC,
18 AND WELLS FARGO ADVISORS
FINANCIAL NETWORK, LLC and
19 DOES 1 through 20,

20 Defendants.
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Case No.

**NOTICE OF REMOVAL OF CIVIL
ACTION PURSUANT TO 28 U.S.C.
§ 1441**

COMPLAINT FILED:

Alameda County Superior Court
Case No. RG13697146
Date Filed: September 26, 2013

1 TO THE CLERK OF THE ABOVE-ENTITLED COURT:

2 PLEASE TAKE NOTICE that Defendants Wells Fargo & Company,
3 Wells Fargo Advisors, LLC and Wells Fargo Advisors Financial Network, LLC
4 (collectively, “Defendants”) hereby remove the above-captioned matter, which was
5 commenced in the Superior Court of the State of California, County of Alameda,
6 Case No. RG13697146, to the United States District Court for the Northern District
7 of California. By making the statements and allegations contained
8 herein, Defendants in no way concede that Plaintiff Kennison Wakefield
9 (“Plaintiff”) is entitled to any recovery. On the contrary, Defendants dispute
10 Plaintiff’s claims in their entirety. The following statements and allegations are
11 made in support of this Notice of Removal and concern the Court’s removal
12 jurisdiction only.

13 1. This is a civil action over which this District Court has original
14 jurisdiction under 28 U.S.C. §§ 1331 and 1367, and Defendants are entitled to
15 remove to this Court pursuant to 28 U.S.C. § 1441(a).

16 2. This action is removed on the basis of federal question
17 jurisdiction because this action arises under the laws of the United States,
18 specifically, the Employee Retirement Income Security Act of 1974, as amended, 29
19 U.S.C. §§ 1001-1461 (“ERISA”). The Supreme Court has held that actions to
20 recover benefits, to clarify entitlement to benefits, or to enforce rights under ERISA
21 plans are completely preempted by section 502(a)(1)(B) of ERISA. Specifically:

22 the ERISA civil enforcement mechanism is one of those
23 provisions with such extraordinary pre-emptive power that
24 it converts an ordinary state common law complaint into
25 one stating a federal claim for purposes of the well-
26 pleaded complaint rule. [Citation.] Hence, causes of action
within the scope of the civil enforcement provisions of
§ 502(a) are removable to federal court.

27 *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004) (internal quotation marks,
28 alteration and citation omitted); ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

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1 3. Here, Plaintiff alleges that he was improperly denied benefits
 2 under the Wells Fargo Advisors, LLC Performance Contributions and Deferral Plan
 3 dated April 15, 2011 (the “Plan”). *E.g.*, First Amended Complaint ¶¶ 25-26. The
 4 Plan is attached as Exhibit A to the First Amended Complaint. The Plan is a so-
 5 called top hat plan, *i.e.*, “an unfunded deferred compensation arrangement for a
 6 select group of management and other highly compensated persons, and all rights
 7 under the Plan will be construed, **administered and governed in all respects in**
 8 **accordance with the provisions of the Employee Retirement Income Security**
 9 **Act of 1974** (as amended from time to time) applicable to such an arrangement. . . .”
 10 First Amended Complaint, Ex. A at p. 14 (attached hereto as Exhibit 2) (emphasis
 11 added); 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). The Plan, in fact, has met the
 12 requirements of ERISA applicable to such top hat plans. *See* Declaration of
 13 Tandace Martz ¶¶ 2-4.

14 4. Plaintiff alleges in conclusory fashion that the Plan “is not
 15 subject to [ERISA] because it is designed to be and is an incentive plan and not an
 16 employee pension benefit plan under or subject to the Act.” First Amended
 17 Complaint ¶ 32. As an initial matter, the Court need not accept as true legal
 18 conclusions “cast in the form of factual allegations.” *W. Mining Council v. Watt*,
 19 643 F.2d 618, 624 (9th Cir. 1981); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
 20 (2007). Moreover, the express language of the Plan states that it is subject to
 21 ERISA. First Amended Complaint, Ex. A at p. 14; *see also In The Matter of*
 22 *ComUnity Lending, Inc.*, 399 Fed.Appx. 242, 243 (9th Cir. 2010) (“There can be no
 23 doubt that the plan at issue was intended to be a top hat plan [because] the plan
 24 states that it ‘was designed and intended to be a Top-Hat plan.’”).

25 5. Accordingly, because Plaintiff’s claims are premised upon
 26 Defendants’ alleged refusal to pay benefits due under the Plan, and the Plan itself
 27
 28

1 explicitly states that it is a plan subject to ERISA, Plaintiff's claims are completely
2 preempted by ERISA and give rise to a right of removal.¹

3 6. The Court has supplemental jurisdiction over the remainder of
4 Plaintiffs' claims pursuant to 28 U.S.C. § 1367.

5 7. The Complaint in the Superior Court action was first served on
6 Defendants on September 30, 2013. Thus, removal of this action is timely under 28
7 U.S.C. § 1446(b).

8 8. Defendants are informed and believe that no defendants other
9 than the named defendants have been joined or served in this action.

10 9. Venue is proper in this district under 28 U.S.C. § 1446(a)
11 because this district and division embrace the place in which the removed action has
12 been pending.

13 10. The following constitute all of the process, pleadings or orders
14 received or served by Defendants in this action, true and correct copies of which are
15 attached as exhibits and incorporated herein as part of this Notice:

16 Exhibit 1 - Summons and Complaint

17 Exhibit 2 - First Amended Complaint

18 Exhibit 3 - Alameda County Superior Court Notice of Complex
19 Determination Hearing and Case Management
20 Conference

21 Exhibit 4 - Defendants' Answer to First Amended Complaint
22
23

24 _____
25 ¹ A removal petition such as the instant pleading must, by rule, be a "short and plain
26 statement of the grounds for removal." 28 U.S.C. § 1446(a). Defendants reserve
27 their right to submit evidence in support of their factual allegations in response to
28 any challenge to removal and federal jurisdiction in this matter. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n.1 (9th Cir. 2002); *Cornell v. Columbus McKinnon Corp.*, Case No. C 13-02188 SI, 2013 WL 3787416 *2 n.1 (N.D. Cal. July 17, 2013).

1 11. Defendants will promptly file a copy of this Notice of Removal
2 with the clerk of the state court in which the action has been pending.

3
4 BASED ON THE FOREGOING, Defendants hereby remove this
5 action, now pending in the Superior Court of the State of California for the County
6 of Alameda, Case No. RG13697146, to the United States District Court for the
7 Northern District of California.

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10 DATED: October 29, 2013

MUNGER, TOLLES & OLSON LLP
TERRY E. SANCHEZ
PUNEET K. SANDHU

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14 By: /s/ Puneet K. Sandhu

15 PUNEET K. SANDHU

16 Attorneys for Defendants
17 WELLS FARGO & COMPANY; WELLS
18 FARGO ADVISORS, LLC; and WELLS
19 FARGO ADVISORS FINANCIAL
20 NETWORK LLC
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